

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

In re US DEPARTMENT OF JUSTICE,)
)
Subpoenas issued to Dr. Mitchell E. Davis) Case Number: 4:17-cv-15
d/b/a City Health and Chiropractic)

**PETITION FOR ORDER SETTING ASIDE ADMINISTRATIVE SUBPOENA AND
MEMORANDUM IN SUPPORT**

COMES NOW Dr. Mitchell E. Davis by and through his undersigned attorneys and pursuant to 18 USC § 3486(a)(5) petitions this Court to set aside and quash the administrative subpoenas served upon him by the U.S. Department of Justice (“Gov’t”) acting by and through Assistant United States Attorney Dorothy McMurtry, and in support thereof states as follows:

1. Petitioner, Dr. Mitchell E. Davis (“Dr. Davis”) is a chiropractic physician who does business as a sole proprietorship using the fictitious names City Health and Chiropractic Clinic and Davis Chiropractic. Davis’ offices are located at 4144 Lindell Boulevard, Suite 319, St. Louis, Mo 63103.
2. On December 1, 2016, the Government, by its FBI agents, executed two search warrants simultaneously upon Dr. Davis at his clinic and upon his wife, Galina Davis at her home. The search warrant served upon Dr. Davis is attached as Exhibit 1 and the search warrant served upon Galina Davis is attached as Exhibit 2. Pursuant to the search warrants, the FBI agents seized one computer that Dr. Davis utilizes at his clinic and seized one cell phone owned and used by Galina Davis. The agents have since returned such items to the Davis’.
3. Simultaneously with the search warrants, the Gov’t’s FBI agents also served upon Dr. Davis two subpoena duces tecum, one addressed to Dr. Davis (Exhibit 3, attached hereto)

and the other to “City Health and Chiropractic Clinic a/k/a Davis Chiropractic” (Exhibit 4, attached hereto).

4. On December 6, 2016, ASUA Dorothy McMurtry by email to the undersigned counsel for Davis, Elkin Kistner, confirmed that Davis was the target of the investigation:

“Dr. Mitchell is the target of the investigation and I anticipate that he will charged with multiple felony offenses” (Exhibit 5, attached hereto).

5. In a subsequent conversation between undersigned counsel and Ms. McMurtry, Ms. McMurtry agreed to extend the return date of the subpoenas from December 16, 2016 to January 6, 2017 (see confirmation email, Exhibit 6).

6. On the face of both subpoenas, the foregoing statement appears: “Issued under authority of Section 248 of the Health Insurance and Accountability Act of 1996, Public Law No. 104-91 18 U.S.C § 3486 (See exhibits 3 & 4).

7. 18 U.S.C. § 3486 (a)(5) provides:

“At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons, or a prohibition of disclosure ordered by a court under paragraph (6)”.

8. Dr. Davis by and though his undersigned counsel, hereby asserts his privilege against self-incrimination under the 5th Amendment of the US Constitution and in doing so asserts that producing the documents requested by the Government’s subpoenas is protected and precluded by Dr. Davis’ assertions of such 5th Amendment privilege.

9. One subpoena is directed specifically to Dr. Davis (Exhibit 3) and the other to City Health and Chiropractic a/k/a Davis Chiropractic (Exhibit 4). Both City Health and Chiropractic and Davis Chiropractic are fictitious names, both owned by Dr. Davis individually (see Exhibits 7 and 8 respectively, attached hereto). Thus, the subpoenas directed to those names

are in effect directed to Dr. Davis individually. Dr. Davis does not and has not operated in any corporate form.

10. The subpoenas are nearly identical and each requests the same nine categories of documents:

- Patient files;
- Patient billing records;
- Appointment calendars, personal calendars, schedule of Dr. Davis;
- Patients sign-in/sign-out sheets;
- Communications of Dr. Davis with a law firm about patients;
- Personnel records and payroll records for all Dr. Davis's employees;
- Business records of Dr. Davis;
- Bank and credit card accounts of Dr. Davis; and
- Payments for accident reports from St. Louis Metropolitan Police Department.

11. All of the documentation requested, being Dr. Davis' records of his chiropractic practice, contain numerous written statements of Dr. Davis or set forth the "contents of his own mind". In addition, the act of producing such records is in itself compelling Dr. Davis to testify that such records exist, that they are in his possession and control, were authentic and were responsive to the subpoenas.

12. The Fifth Amendment to the United States Constitution can be invoked by one who is asked to produce the records of a sole proprietorship, as Dr. Davis is here. United States v. G & G Advert. Co., 762 F.2d 632, 634 (8th Cir. 1985), citing United States v. Doe, 465 U.S. 605, 104 S.Ct. 1237, 1245, 79 L.Ed.2d 552 (1984).

13. The United States Supreme Court has held that the act of producing documents in response to a subpoena may have a compelled testimonial aspect, in that “the act of production” itself may implicitly communicate statements of fact. United States v. Hubbell, 530 U.S. 27, 36, 120 S. Ct. 2037, 2043, 147 L. Ed. 2d 24 (2000). By “producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.” Id.

14. Such is the case here. The Fifth Amendment right against self-incrimination extends to the act of production of the records here sought, which would compel Dr. Davis to testify that such records exist, that they are in his possession and control, are authentic and are responsive to the subpoenas.

WHEREFORE, Dr. Mitchell E. Davis requests that this Court enter its Order setting aside and quashing the administrative subpoenas attached hereto as Exhibits 3 and 4, and grant all such further relief as the Court deems just.

BICK & KISTNER, PC

By: /s/ James P. Bick, Jr.

James P. Bick, Jr. #34322MO

Elkin L. Kistner #35287MO

101 South Hanley Road, Suite 1280

St. Louis, MO 63105

(314) 727-0777

(314) 727-9071 (Fax)

jim@bick-kistner.com (E-mail)

elkinkis@bick-kistner.com (E-mail)

Attorneys for Mitchell E. Davis

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 5, 2017, the foregoing document was filed electronically via the Court's electronic filing system and served upon to the following by electronic mail and U.S. Mail:

Dorothy L. McMurtry
Assistant United States Attorney
111 South Tenth Street
St. Louis, MO 63102
dorothy.mcmurtry@usdoj.gov

/s/ James P. Bick, Jr.